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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1954.

J. STACEY HENDERSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. 657

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

L. E. GWINN,
725-35 Columbian Mutual Tower,
Memphis, Tennessee,
C. P. J. MOONEY,
1100 Commerce Title Building,
Memphis, Tennessee,
Counsel for Petitioner.

EUGENE P. BOYD,
Memphis, Tennessee,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

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(1) The expressions of opinion by Assistant District Attorney Vaden in the opening argument and by Assistant District Attorney Joyner in the closing argument violated the established rule that remarks, indicating the prosecuting attorney's personal opinion that the defendant is guilty, are not merely a breach of professional propriety and professional ethics, but constitute prejudicial and reversible error 18

(2) Was the cumulative effect of the matters set out in (1) to (15) above, including: (a) the failure of the Court, upon adequate request, to prevent prejudicial witnesses from volunteering extraneous matters into the proceeding, such as the reference to a group to whom petitioner presented his proposition, as a room "full of suckers"; (b) the injection of irrelevant, prejudicial matters into the proceedings by improper

questions and argument wherein these attorneys, without a scintilla of evidence in the record, referred to purchasers from petitioner as "poor people", "poor old man", "poor fellow", et cetera; (c) the injection into the proceedings of such matters as the age of the mother and grandmother of a young man for whom an investment was made in the enterprises of petitioner; (d) the failure of the trial judge to maintain, at all times, that attitude of disinterestedness which is a fundamental of a fair and impartial trial; and (e) the challenge to the jury and to the doctrine of reasonable doubt in the argument of the Government attorneys—so destructive of the fairness of the trial and such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision by the Supreme Court? 21

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1954.

J. STACEY HENDERSON,
Petitioner,
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UNITED STATES OF AMERICA,
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No. .....

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, J. Stacey Henderson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case January 11, 1955.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), Rules 21-23 of this Court, and Rule 37 (c) of the Federal Rules of Criminal Procedure.

QUESTIONS INVOLVED.

(a) **Whether this Court should review the opinion of the Court of Appeals, deciding an important question of Federal law, to-wit, the right of the United States Attorney to express his individual opinion as to the guilt of petitioner, a question which has not been, but should be, settled by this Court.**

(b) Whether the Court of Appeals, in affirming the judgment of the District Court, so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision, and particularly with respect to the injection of irrelevant, prejudicial matters into the trial, and appeals to class prejudice through improper questions and argument by the Government attorneys, and the failure of the trial judge to maintain an attitude of disinterestedness, the cumulative effect thereof being destructive of the fairness of the trial.

STATEMENT OF CASE.

Petitioner was indicted under a ten count indictment, four of which counts were under the mail fraud statute (18 U. S. C., No. 1341; five of which counts were under the Security and Exchange Statute (15 U. S. C., No. 77), the remaining count being a conspiracy charge under 18 U. S. C., Section 371. The jury returned a verdict of guilty on the first count of the indictment and a verdict of not guilty on the other nine counts. He was sentenced to five years imprisonment and a fine of $1,000 was imposed.

On appeal, the case was reversed because of the admission of evidence which the Court considered incompetent and prejudicial (Henderson v. U. S., 202 F. 2d 400). Peti-

tion for rehearing was denied (204 F. 2d 127). The opinion was by a divided Court, Judge McAllister dissenting on the ground that petitioner's motion for a judgment of acquittal should have been sustained (202 F. 2d 406; 204 F. 2d 127).

On the retrial, under the first count, charging a violation of the mail fraud statute, petitioner was again found guilty by a jury and received a sentence of five years imprisonment and a $1,000 fine. On the second appeal, this judgment was affirmed in an opinion rendered by Judge Miller, in which Judge Simons concurred. Judge McAllister again dissented on the ground that the "**argument of the District Attorney, and the manner in which it was presented, wherein he expressed his individual belief in the guilt of the accused, and the intimation that the jury was under its oath and duty to convict the appellant (petitioner) constituted reversible error.**"

THE FACTS.

Facts Relevant to the Ground on Which Judge McAllister Dissented.

We shall first present the facts relevant to the ground of Judge McAllister's dissent and then the facts relied upon to show that petitioner did not receive a fair and impartial trial.

The Public Prosecutors Expressed Their Individual Opinions as to the Guilt of Petitioner.

In the opening argument of Assistant United States Attorney Vaden, the following occurred:

> "The man (Henderson) didn't have a dollar, and ends up—he bought an automobile in Detroit, bought another one out on Summer Avenue. I don't know what model that was to go with that convertible. But,

in any event, this fellow wasn't doing bad. These poor people here put the money in here.

He said, 'I owned the pump, I owned the casing.' As a matter of fact, jerked the casing out of the well, took it off—sold it. And the dog-gone stuff is pretty expensive. Couldn't tell you—took the power unit off and sold it. Took the tanks off and sold it. And here is the bad part. With the tank, he takes ninety-nine barrels of oil off and sells it, too. Mr. Mooney put him back on the stand, said, 'By the way, what did you do with the ninety-nine barrels of oil you sold?' He said, 'I kept that for expenses.' These poor people, by the time the expenses got through with them—

But, be that as it may, this is the contract. It is a good faith contract. Mr. Mooney will explain it to you. This is the lease they were putting hard earned money into, that never did go on record.

* * * * * * *

* * * These things happen all the time. You read about it, and you like to stand around corners and say, 'Why doesn't the Government do something about all this stuff?' I have heard you. 'They ought to do something about it. They ought to get these people doing this stuff.' I have heard you. 'They'—you are 'they'—(R. 469a).

Mr. Mooney: If the Court please, I object to that, it is arguing inflammatory——

Mr. Vaden: Excuse me.

Mr. Mooney: It is, as I said a moment ago, an appeal to prejudice, and nothing else.

The Court: What was?

Mr. Mooney: It is just an inflammatory appeal to prejudice, and nothing else—about what people say on corners—nothing else. That is in the Tennessee case of Watkins versus State; it is not fair.

The Court: Well, leave that out, Mr. Vaden.

Mr. Mooney: We are trying this lawsuit—this only.

Mr. Vaden: I will take that back, the word 'they.' I will take that back, Your Honor. But this is the Government. This is the Government. You are the Government. You are the people that have got to decide this thing. There are just twelve people. They are you. His Honor can't decide it. I can't decide it. I get so much a month; it is passed out—so does Mr. Joyner—Mr. Hodges. So does Millsaps Fitzhugh, the United States Attorney.

This Grand Jury indicted this man, and when they indict him, we are going to prosecute him. And that is what I am paid for, what I am going to do. I took an oath. You took an oath. I am doing my duty. I am doing it. I am going to do it. It may not be big—but I am going to do it—hot or cold—if I believe a man guilty. And if I don't believe he is guilty, no one is going to make me stand here and prosecute him—not going to do it. But if I believe he is, I am going to put witnesses on here—people like Mr. Tell White" (A. 470a).

In the concluding argument, Assistant District Attorney Joyner said:

"There was a time yesterday afternoon—yesterday evening, when I was a little bit confused about this lawsuit as a result of Mr. Mooney's argument. And I think you might also be confused. This gentleman here in the tan suit—at the end of the table this side of Mr. Hodges is Mr. Edward Vaden, and he is not on trial. He is an assistant to Mr. Millsaps Fitzhugh, the United States Attorney, sitting here. He is not on trial. He is not charged in any way in any indictment. And so far as the information has been of any

vices he has got—I will tell you he smokes too much —and so far as I know—don't know now about it.

This gentleman in the tan suit, who looks like he is about as nervous as I am this morning, is the defendant.

Mr. Mooney: Excuse me. I object to the comments on Mr. Henderson's condition. Your Honor knows he is a sick man.

The Court: Yes, that is not proper.

Mr. Joyner: I beg your pardon.

Mr. Mooney: Your Honor might advise them about the current condition today.

The Court: The jury won't consider that for any purpose in the trial of this case.

Mr. Joyner: Be that as it may, this gentleman right here is the one that is on trial. He is the subject of this indictment. And he is the one about whom we want to talk today, if you will permit me" (R. 472a-473a).

* * * * * * *

The Government introduced the witness, Carroll Lambert, who assigned the two leases involved herein to petitioner for development purposes, and he testified that he considered it worthwhile for petitioner to drill on these leases (R. 88a, 89a). Evidently, disappointed in this testimony, the Government attorney, in concluding his argument to the jury, thus attacked petitioner and Lambert:

"Mr. Joyner: * * * Here is the way we set one of these up. We are going to get in the oil business now and make us some money. Go down there and we say, 'Lambert, I want to get in the oil business down there. I think I ought to set me up a good deal out on the highway down there, where I can ride people by and sell them some interests. And you get a good lease—got to set this thing up right. This is a pretty good

lease. Now, some gimmick—gimmick to make it sell. You have got a pocket full of leases—can't just sell me one of those. You have got to have a gimmick in there, got to have a trick in there—way back—got to have a trick in there to make it attractive—something to separate folks from their money. Anybody down there can give me a lease. Anybody down there can drill a well. Ought to have something good.' So what did they do? Lambert says, 'I have got one that hasn't been touched in thirty-five years—capped off—ought to be oil down there now; two wells down there, one producing gas, the other producing oil. But the one come in, got sixteen hundred barrels of oil-producing well' " (R. 473a).

Counsel for petitioner objected to this argument, but the objection was overruled (R. 475a).

Assistant District Attorney Vaden also attacked Lambert as a conspirator in his opening argument. Petitioner's objection was overruled (R. 461a, 462a, 464a).

And this from the concluding argument of Assistant District Attorney Joyner:

"Mr. Joyner: * * * And now it is dumped in your laps—see. We have about finished. Your own conscience—your own conscience. If your mind cannot rest easily on a verdict—if there is a reasonable doubt—answer me this: Can your mind rest easily on a not guilty verdict?

Mr. Mooney: If the Court please, I think he ought to stop right there. I object to that.

The Court: A little louder, Mr. Mooney.

Mr. Mooney: He asked the alternate question, in substance, 'Can your mind rest easily on a not guilty verdict—they should not be allowed to bring the Court a not guilty verdict.'

The Court: Are you objecting?
Mr. Mooney: I certainly am, sir.
The Court: Objection overruled" (R. 477a).

Comment of Judge McAllister.

Peculiarly appropriate to the foregoing quotations from the arguments of the Government attorneys is the language of Judge McAllister in his dissenting opinion, from which we quote as follows:

> "In the instant case, the district attorney admonished the jury that both he and the jury had taken an oath to do their duty; that he was doing his duty and was prosecuting the accused because he believed him guilty, although no one could make him undertake the prosecution unless he did believe him guilty. The foregoing should be considered together with the statement to the jury—almost an accusation—that the district attorney had heard members of the jury standing around corners asking why the government did not do something about these things, and also saying that the government ought to get the people who did such things; that neither he, as district attorney, nor the district judge could do anything about it; that the jury had taken an oath to do its duty; and then the question was asked of the members of the jury, whether their minds could rest easily on a not guilty verdict. The impression which these statements and arguments made on the jury seems self-evident—that the jury, as citizens, had been complaining why the government did not get malefactors such as appellant; that the district attorney now had appellant before them in court and believed him guilty inasmuch as no one could make him prosecute unless he believed the man guilty; that the jury itself was the government over whose remissness, in the past, they

had complained; that while the district attorney could not do anything about the decision, he had taken an oath to do his duty and was doing his duty because of his belief of the guilt of appellant, and he strongly intimated that since the jury had taken an oath also to do its duty, their minds could not rest easily on a non-guilty verdict. To bring in a verdict of guilty on the ground that the minds of the members of the jury could not rest easily on a not guilty verdict would be a failure on the part of a jury to perform its duty. The criterion is not whether the minds of the members of the jury could rest easily on a verdict of not guilty. In fact, in a criminal case, the members of the jury could well perform their duty in returning a verdict of not guilty and their minds might still be very uneasy in cases where they had the strongest suspicion of the guilt of defendant, and yet could not say that he was guilty beyond a reasonable doubt. Under these circumstances, the district attorney's personal belief, as expressed to the jury, that appellant was guilty constituted prejudicial error." (Appendix to this petition.)

Other Facts, Comments, and Rulings Bearing on the Fairness of the Trial.

(1) Preliminary to the examination of any witnesses, the following occurred:

"Mr. Mooney: If Your Honor please, at the last trial there were a number of witnesses—Miss Ransom, Mr. and Mrs. Ferguson, Pirtle—J. O. Pirtle, Mrs. Evalena Davies, the co-defendants Rout and Parker—who in giving their testimony injected into the record many irrelevancies. When counsel would be objecting to their testimony, some of the witnesses, particularly Miss Ransom, and others, would continue to talk. * * *

* * * * * * *

The Court: Well, those are matters—I have no way of knowing what witnesses the Government will use in this trial. * * *

Those are matters within the control of the Court at the proper time. And the Court will have no way of making any ruling that will control those kind of things.

Call the jury in, Mr. Marshal" (R. 20a).

(2) This occurred during the direct examination of Mrs. V. L. Ferguson, a witness for the Government:

"Q. Are you about as nervous as I am?

Mr. Mooney: I object to that, if the Court please. If anybody is nervous, I suggest we take a recess.

The Court: All right, let's move on.

Mr. Mooney: Now, if Your Honor please, I want to have some ruling on that. He says, 'Are you as nervous as I am?'

Mr. Joyner: I will withdraw the question, may it please Your Honor" (R. 40a).

(3) And this during the direct examination of the Government Witness Wessell:

"Q. Mr. Wessell, I would like to know how you paid this five hundred dollars. Was that by cash or by check? A. By check.

Q. By check? A. Yes, sir.

Q. And was that drawn on your own checking account? A. Savings account.

Q. Savings account? A. Yes, sir.

Q. And how much money did you have in your savings account? A. About twelve hundred dollars.

Q. Was this before you took the five hundred out? A. Yes, sir."

(An objection was sustained and the question withdrawn [R. 113a, 114a]).

(4) And this during the direct examination of the Government Witness, Mrs. Davies:

"Q. I ask this question—this section you saw, tell me whether or not you requested Mr. Henderson to show you the lease, the same place where you had invested the thousand dollars? A. I did.

* * * * * * *

Q. And you mentioned—— A. (Continuing) And he told me that that well was the place that I had invested in.

Q. Yes, ma'am. That is what I was asking. Now, you mentioned that there were several—was this on a paved road, or country road, or gravel road, or out in somebody's front yard, or where was this place? A. It looked like the back end of nowhere, and as I stated a few minutes ago, I had to wade mud——

Mr. Mooney: If Your Honor please—— A. (Continuing) ——to get there.

Mr. Mooney: Excuse me. Will Your Honor instruct Mrs. Davies when I rise to object, to please cease talking?

The Court: I think she did.

Mr. Mooney: Well, I differ with the Court, or I wouldn't have said that, if Your Honor please.

The Court: What is the objection?

Mr. Mooney: If the Court please, Mrs. Davies makes remarks—we don't need dramatics in this case—this coloring up, 'He took me to the end of nowhere.' I don't think that is competent in this case.

The Court: All right. The jury won't consider that particular statement. All right" (R. 144a, 145a).

(5) And this occurred during the examination of Mrs. Davies:

"Q. ——if you did purchase from Mr. Rout about the 29th of October, 1948, an interest in an oil deal

that he was promoting or conducting down in the same territory, did you not? A. I purchased it from Mr. Rout, but not as an oil deal he was promoting for himself, but as one that he was promoting in cooperation or coordination or in connection with Mr. Henderson, Mr. Mooney. That was the first time that I ever knew that Mr. Henderson was in the oil business, was at the time that Mr. Rout approached me, and he had gotten a part of this lease from Mr. Henderson to develop for the two of them.

Mr. Mooney: I object to that.

Mr. Vaden: Just let her testify, Your Honor.

The Witness: Excuse me.

Mr. Mooney: If Your Honor please—just a moment.

Mr. Vaden: I say she has got a right to explain her answer, Your Honor.

Mr. Mooney: Just a minute. And I have got a right to object. I haven't lost any rights since I went from that side of the table to this one.

The Court: No aside remarks. Just make your objection.

Mr. Mooney: If Your Honor please, I have got a right, and I am objecting to what Mr. Rout told her about Mr. Henderson having an interest in his forty-eight acre deal, in his other deal—that that is deal known as Tract 3.

The Court: You asked her if she had a deal with Rout.

* * * * * * *

Mr. Mooney: He is not on trial for it, if Your Honor please, but if some people are telling things on Henderson that they mean against Rout, and someone comes in here and says it is the first oil deal they have been into, I have a right to ask them if they have not been in prior deals.

The Court: All right, you ask these questions at your own peril'' (R. 148a).

And this during the cross-examination of Mrs. Davies:

> "Q. There were approximately fifty people there that heard it? A. I won't say there was fortyfive, forty-nine, fifty. It was a fairly good sized room full of suckers" (R. 150a).

(6) Government counsel injected certain remarks into the proceeding during the cross-examination of Witness Keller, and these remarks and the restrictive rulings of the court with respect to the use of the former record, showing the testimony of this witness, were destructive of the value of the record to show the inconsistencies between the testimony of that witness in the instant case and his testimony on material matters at the former trial (R. 167a, 173a).

(7) The interference by Government counsel in the cross-examination of the Witness Pirtle and his assertion that counsel for defendant was harassing the Government witnesses, and on this point we quote from the record as follows:

> "Mr. Joyner: May it please Your Honor, this is another example of just what counsel has been doing with every witness on the stand, trying to make it appear to this jury that their testimony is at variance now from what it was then.
>
> And he has yet to point out a single departure where this witness has varied in any material circumstance, or in any material fact to this lawsuit.
>
> And it is obvious to me, as I am sure it is to the Court, that the only thing he is undertaking to do is confuse the jury and I object to it.
>
> Mr. Mooney: Your Honor, please, I think the wording of that—delivering anacoluthic outbursts—they don't have a right except by putting on and asking, just as I am asking, just—and undertaking to introduce proof. It is up to the jury, not to counsel or the

prosecuting attorney, to determine whether it is at variance with testimony at one time or other.

The Court: All right, gentlemen, it is pretty hot, and it is getting pretty late. Let's move on there.

Mr. Mooney: And I am making an objection. Are you saying move on?

The Court: Yes, sir. Yes, sir. We want to finish with this witness this afternoon" (R. 199a, 200a).

(8) And this during the direct examination of the Government Witness Parker:

"Q. All right. Do you know, or did you know at that time a Mrs. Laughlin and a Mrs. Forrester? A. I did.

Q. Who were they? A. They were mother and grandmother of the boy that worked with us in the Sun Lumber Company. And, incidentally, two hundred fifty dollars of this five hundred dollar check was for their quarter interest, and——

Q. What was the occasion of your putting in two hundred fifty for them? A. Well, this boy was a good friend of mine, and he worked hard, and I just wanted them — to make a present to them, if it amounted to anything; in other words, help them out.

Mr. Mooney: If Your Honor please, that is immaterial about his motives, and I object to that.

The Court: Objection overruled.

Mr. Mooney: May I have an exception?

* * * * * * *

Q. What was Mrs. Laughlin and Mrs. Forrester—the mother and grandmother—you say you were acquainted with those people? A. Yes, I was.

Q. How old are they? Who are they? A. Well, the mother of the boy I would say was around forty-five years old or fifty. And the grandmother was probably

up in the seventies, or seventy-five. And this boy was having to help support both of them. So I——

Mr. Mooney: If Your Honor please, I object to that. That is utterly immaterial, about the boy having to support his mother, or someone, that Mr. Parker made them a present of it.

The Court: Strike it. All right, the jury won't consider it" (R. 208a, 209a).

(9) And this occurred during the examination of the Witness Parker:

"Q. Now, Mr. Parker, on this Exhibit 'Q,' you kept a copy of it, did you not, sir, a carbon copy when you made it? A. I am not positive whether I had a carbon copy of that.

Q. And you delivered that to Mr. Henderson? A. That was made out at his house, in his presence.

Q. Yes, sir. And then I believe you were shown on this list you owned, as the way the list is now, one and one one hundred twenty-eighth units—as it appears now? A. As originally appeared it showed three units.

Mr. Mooney: We are going to bring that out.

The Court: Mr. Mooney, get back behind the table, please, sir.

Mr. Mooney: Well, I have to point——

The Court: I mean get back and stay there.

Mr. Mooney: Well, I don't think I should be addressed in that way, if Your Honor please.

The Court: Well, I asked that several times, and I mean it.

Mr. Mooney: Well, I except to the tone. I don't think I need that. Others have been up there. I don't see it is——

Mr. Joyner: Let the record show, may it please the Court, that for the last fifteen or twenty minutes Mr. Mooney has been standing up there next to the witness.

The Court: That goes for everybody. Stay behind the table.

Mr. Mooney: Yes, sir" (R. 255a).[1]

(10) The statement of the Government attorney in response to the objection of counsel for defendant to certain questions asked during the cross-examination of defendant, to-wit: "I know it hurts" (R. 352a).

(11) And this during the cross-examination of the defendant Henderson:

"Q. Leading highway. Talking about that—and I will ask you this question: In these operations being conducted there, and which you state that you had conducted, and in this operation, has it been your custom and practice to sell substantial numbers of units to women?

Mr. Mooney: If Your Honor please, I object to that. That makes no difference whether he sells to women, or whom.

The Court: Objection overruled."

(12) In the opening argument for the Government, this occurred:

"Mr. Vaden: * * * Old man Ford—poor old man. There is his cancelled check. I just happened to see it. As a matter of fact, there are two of them—fifteen hundred smackers. That old man worked hard for that money, I bet you. This is Mr. James P. Ford—you heard testify.

Mr. Mooney: If Your Honor please, I did not want to object. I thought he might mention that once or twice and pass on; but that is about the tenth time, now, he has mentioned about people working hard for

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[1] This peremptory order to counsel for defendant is in striking contrast to the privilege extended Government counsel in examining a witness holding a map (R. 118a, 119a, 209a).

their money. 'That old man worked hard for that money'—that doesn't convict him. He should not comment on that. Defendant has got a right to be tried fairly, without appeals to prejudice.

The Court: I don't see anything objectionable in that argument.

Mr. Mooney: I note my exception.

Mr. Vaden: Fifteen hundred dollars, whether he worked hard for it or not. He looks like a hard-working man to me. You all saw him. Nobody gave him that fifteen hundred dollars" (R. 467a).

(13) During the examination of Tell T. White, testifying as an expert witness for the Government, there were so many hypothetical questions, objections, interruptions and comments by the Court, who described this testimony as "chopped up" and stated, "I am a little confused about it myself" (R. 431a), as to destroy the probative value of this testimony (R. 430a-436a, 441a).[2]

(14) In the final argument for the Government, the jury was told that defendant called on Lambert, a Government witness, and asked him for "tricks and gimmicks" to make the deal attractive—to separate folks from their money (R. 473a), and that Lambert told petitioner how to "dress up" the deal (R. 437a-475a). Petitioner's objection to this argument was overruled (R. 475a).

(15) While cross-examining the Government witness, Ford, counsel for defendant, objected to the interruption by the District Attorney and the Court passed the objection off with the remark, "It is getting hot and it is getting pretty late. Let's move on there" (R. 200a).

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[2] The testimony of White was the predicate on which Judge Miller rested his conclusion that there was "no basis for any reasonable expectation on the part of appellant (petitioner) of bringing oil in on the leases in commercial quantities."

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED.

(1) The expressions of opinion by Assistant District Attorney Vaden in the opening argument and by Assistant District Attorney Joyner in the closing argument violated the established rule that remarks, indicating the prosecuting attorney's personal opinion that the defendant is guilty, are not merely a breach of professional propriety and professional ethics, but constitute prejudicial and reversible error.

No. 15, Canons of Professional Ethics—American Bar Association; Volume I, Bishop's New Criminal Procedure, Sec. 293 (3); Volume II, Bishop's New Criminal Procedure, Sec. 975a (2); 53 Am. Jur. 392, "Trial", Sec. 486; 23 C. J. S., Sec. 1104, page 578; State v. Thayer, 124 Ohio St. 1, 176 N. E. 656; 75 A. L. R. 48; State v. Gunderson, 26 N. D. 294, 144 N. W. 659; Commonwealth v. Ronella, 251 Pa. 329, 96 Atl. 826, 829; Loomis v. State, 78 Ga. App. 153, 51 S. E. 2d 13, 31; Bynum v. State, 254 Ala. 22, 47 So. 2d 247; Sparks v. State, 59 Ga. App. 883, 884, 2 S. E. (2) 506; Byrd v. State, 72 Ga. App. 840, 842, 35 S. E. 2d 385, 386; People v. Edgar, 34 Cal. App. 459, 167 Pac. 891, 894; People v. Beal, 116 Cal. App. 476, 254 Pac. 2d 100, 101; McClofton v. State, 20 Ala. App. 591, 104 So. 347, 349; Fitzgerald v. State, 91 Okla. Crim. 437, 219 Pac. 2d 1024, 1027; Morehead v. State, 12 Okla. Crim. 62, 151 Pac. 1183; State v. Pope, 338 Mo. 919, 92 S. W. 2d 904, 908; State v. Clark, 114 Minn. 342, 131 N. W. 369; Balis v. State, 137 Neb. 835, 291 N. W. 477, 481; Long v. State, 120 Tex. Cr. 373, 48 S. W. 2d 632, 642; People v. Hoffman, 399 Ill. 57, 77 N. E. 2d 195, 199; State v. Blackman, 108 La. 121, 32 So. 334; Gaines v. State, 95 Tex. Cr. 368, 251 S. W. 245, 247, 248; People v. Provo, 409 Ill. 63, 97 N. E. 2d 802; State v. Parker, 104 Vt. 494, 500, 162 Atl. 696, 699; Weitz v. State, 48 Ohio App.

421, 194 N. E. 386; People v. Hale, 82 Cal. App. 2d 827, 187 Pac. (2) 121, 124; dissenting opinion, Judge McAllister, instant case, and authorities therein cited.

In **People v. Beal**, 116 Cal. App. 476, 254 P. 2d 101, the Court said, quoting from People v. Edgar:

> "* * * 'When the district attorney declared that he would not prosecute any man he did not believe to be guilty, he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. * * *'"

In **Byrd v. State**, 72 Ga. App. 840, 842, 35 S. E. 2d 385, 388, the Court said:

> "Counsel's 'never justified in expressing the opinion, however he may entertain it, that one whom he is pursuing is guilty. Such opinion is not legal evidence, and in no circumstances, and at no step in the proceedings, is he entitled to thrust it into the case, either by direct words or by implication.' 1 Bishop's New Crim. Proc., Sec. 293 (3)."

In **Fitzgerald v. State**, 91 Okla. Crim. 437, 219 P. 2d 1024, 1027, the Court said:

> "* * * 'It is improper for prosecuting attorney to state his personal opinion as to the defendant's guilt, or state facts not proved by evidence.' * * *"

In **People v. Hoffman**, supra, the Court held that a statement of the prosecuting attorney that "if he and his associates were not positive" of the defendant's guilt, they would not ask a conviction. The Court held that this was "an improper and prejudicial statement."

In **Commonwealth v. Ronello**, 251 Pa. 329, 96 Atl. 826, 829, the prosecuting attorney thus expressed himself in his closing address to the jury:

> "I say to you again, if I did not think he (the defendant) was guilty, I would not ask you to find him guilty, because my oath does not require anything of that kind. My own honest conviction is that he did that dastardly deed."

The Court, commenting thereon, said:

> "This remark was wholly inexcusable, and so violative of the prisoner's right to a fair trial on the evidence submitted, and that alone, that a mere caution to disregard could give no assurance that the prejudice otherwise certain to result to the defendant had been averted. It was an abuse of discretion on the part of the court to refuse the motion for the withdrawal of a juror and the continuance of the case."

In **State v. Gunderson**, 26 N. D. 294, 144 N. W. 659, 660, counsel for the State said to the jury, in its closing argument, "I do not come here to try a case unless the defendant is guilty." Speaking of this statement, the Court said:

> "* * * It is universally held that such remarks are not merely a breach of professional propriety and professional ethics, but constitute legal error. * * *"

In a search of the above-cited authorities, and others, prohibiting the expression of the personal opinion of a prosecuting attorney as to the guilt of the accused, it would be difficult to find language more generally condemned than that used in the opening argument of the Government in this case when the Assistant District Attorney said:

> "This grand jury indicted this man, and when they indict him, we are going to prosecute him. * * * I am going to do it—hot or cold—if I believe a man guilty. And if I don't believe he is guilty, no one is going to make me stand here and prosecute him—not going to

do it. But if I believe he is, I am going to put witnesses on here—people like Mr. Tell White" (R. 470a).

The language of the prosecuting attorneys, expressing their opinion of the guilt of petitioner, was not palliated by the context and was necessarily prejudicial and reversible error.

The cases relied on by Justice Miller in support of his conclusion to the contrary were so clearly and adequately distinguished in the dissenting opinion of Judge McAllister (see pages 12 and 13 of the Opinion) that we deem it unnecessary to review and distinguish the cases cited in the majority opinion of the Court of Appeals in this case.

(2) **Was the cumulative effect of the matters set out in (1) to (15) above, including: (a) the failure of the Court, upon adequate request, to prevent prejudicial witnesses from volunteering extraneous matters into the proceeding, such as the reference to a group to whom petitioner presented his proposition, as a room "full of suckers"; (b) the injection of irrelevant, prejudicial matters into the proceedings by improper questions and argument wherein these attorneys, without a scintilla of evidence in the record, referred to purchasers from petitioner as "poor people", "poor old man", "poor fellow", et cetera; (c) the injection into the proceedings of such matters as the age of the mother and grandmother of a young man for whom an investment was made in the enterprises of petitioner; (d) the failure of the trial judge to maintain, at all times, that attitude of disinterestedness which is a fundamental of a fair and impartial trial; and (e) the challenge to the jury and to the doctrine of reasonable doubt in the argument of the Government attorneys—so destructive of the fairness of the trial and such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision by the Supreme Court?**

(a) A reading of the opinions in the first trial (202 F. 2d 400 and 204 F. 2d 126) clearly indicated the necessity of extreme care on the part of the trial judge to prevent the injection of extraneous, prejudicial matters into the proceedings, and this necessity was pointed out by counsel for petitioner before the introduction of any evidence (R. 20a). Under the Federal system:

> "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that the verdicts of juries be rendered only on the issues made by the pleadings and the evidence. * * * New York Central Railroad Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706."

See, also, **Glasser v. U. S.**, 315 U. S. 60.

(b) The appeals to prejudice by the Assistant District Attorneys during the examination of witnesses, in their argument, violate fundamental rules of fairness that are generally recognized and applied in both state and federal cases. Where large numbers of persons had lost money in oil investments, the jury, not unnaturally, would be biased against the person alleged to be responsible for such losses and, in such a case, emphasis on the financial status of the losers, and particularly in the absence of any evidence as to such status, was clearly prejudicial.

In **Pharr v. U. S.**, 6th Cir., 48 F. 2d 767, 771, the Court said:

> "* * * The references by counsel for the government, in his concluding argument, to the misfortunes of women, widows, and orphans resulting from the wrecking of the bank were in no sense pertinent to the presentation of the issues of the case, and were highly improper. The courts have uniformly condemned arguments of this character, the sole tendency of which is to defeat a fair trial. * * *"

In a civil case, **Vanarsdol v. Farlow**, 200 Ia. 495, 203 N. W. 794, the Court said:

> "This practice of referring to the worth or poverty of the respective litigants has been too often condemned by this court to need citation of authority. The law knows no such thing as a rich man or a poor man, but seeks to treat all alike to the end that even justice may be dispensed. Litigants must be so treated by the attorneys and the courts. It was a prejudicial error for the plaintiff's counsel to so refer to this matter in his address to the jury, and, if for no other reason, we would have no hesitancy in reversing this case on that ground."

The case of **Norman v. U. S.**, 6th Cir., 100 F. 2d 905, 907, cited by Judge Miller in the majority opinion in the instant case, is not in conflict with the general rule stated in the Pharr case. In the Norman case, the Court said:

> "* * * If one sets out to victimize persons least able to guard themselves against fraudulent schemes he may not with justice complain if their status is disclosed, and the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice. * * *"

In the Norman case, the case was dealing with a certain class of investors, and there was evidence of their financial status. Such is not the situation here, and the appeal to class prejudice was without the slightest justification.

(c) What has been said with reference to (b) hereof applies with equal force to this classification. It was obviously the purpose of the Government attorneys in their inquiry as to the amount of Witness Wessell's bank deposit and the age of the mother and the grandmother of a boy who worked at the Sun Lumber Company to prejudice the jury against the petitioner and having in-

troduced it for that purpose, the Government should not be heard to say that it would not have the intended effect. (**Coulston v. U. S.**, 10th Cir., 51 F. 2d 178, 182.)

(d) It is clearly the duty of the trial judge to maintain, at all times, that attitude of disinterestedness which is the foundation of a fair and impartial trial (**Williams v. U. S.**, 9th Cir., 93 F. 2d 685; **Baker v. U. S.**, 5th Cir., 156 F. 2d 386, 389). We do not mean to imply that the trial judge was intentionally unfair, but the obvious difference in his attitude toward the respective counsel for the Government and petitioner could not have failed in some degree appreciable, but not measurable, to have prejudiced the jury against the petitioner.

(e) The challenge to the jury and to the doctrine of reasonable doubt.

It was stated to the jury by the Government attorneys that:

> "These things happen all the time, you read about it and you like to stand around corners and say, 'Why doesn't the Government do something about all this stuff?' I have heard you. 'They ought to do something about it. They ought to get these people doing this stuff.' I have heard you. 'They' — you are 'they'——" (R. 469a).

And in connection with this statement the Government attorneys emphasized the oath they had taken to do their duty and flung this challenge in the face of the jury: "Can your mind rest easily on a not guilty verdict?" (R. 477a). This was flagrant error (**U. S. v. American Dye and Instrument Works**, 3d Cir., 213 F. 2d 731). It struck a blow at the very heart of the doctrine of reasonable doubt.

As stated by Judge McAllister in his dissenting opinion (see page 11 of the Opinion):

"* * * To bring in a verdict of guilty on the ground that the minds of the members of the jury could not rest easily on a not guilty verdict would be a failure on the part of a jury to perform its duty. The criterion is not whether the minds of the members of the jury could rest easily on a verdict of not guilty. In fact, in a criminal case, the members of the jury could well perform their duty in returning a verdict of not guilty and their minds might still be very uneasy in cases where they had the strongest suspicion of the guilt of defendant, and yet could not say that he was guilty beyond a reasonable doubt. * * *"

The importance of this matter cannot be over-emphasized. The doctrine of reasonable doubt is one of the fundamentals of our system of jurisprudence. In **Hibdon v. U. S.**, 204 F. 2d 833, 838, the court said:

"The humanitarian concept that is at the base of criminal prosecution in Anglo-Saxon countries and which distinguishes them from most continental European nations, is the presumption of innocence which can be overturned by proof beyond reasonable doubt."

CONCLUSION.

It is always proper to consider the cumulative effect of errors committed at the trial. (**Berger v. U.S.**, 295 U. S. 78).

Relevancy to the issue involved is a necessary condition to the admissibility of all evidence, and a verdict is vitiated where this rule is violated to such an extent that the material issues are obscured or smothered in a haze of irrelevancies.

People v. Posner, 273 N. Y. 284, 7 N. E. 2d 93, 96;
Wigmore on Evidence, 3rd Ed., Sec. 39;
Wharton on Criminal Evidence, 11th Ed., Sections 222, 226, 228;
Jones on Evidence, 2nd Ed., Sec. 588.

The question of wealth or poverty, "suckers" or sages, courage or cowardice of jurors, and other matters injected into the proceedings, including the constant interruption and comments by counsel for the Government during the examination and cross-examination of witnesses by the attorney for petitioner, when considered in connection with the difficulty of relating the evidence under Count I, under which petitioner was being tried in the instant case, to the matters involved in several counts on which he was acquitted in the first trial clearly presented a situation so confusing as to deprive petitioner of a fair trial under the law and the evidence. The few instances in which petitioner's objections were sustained did little to clarify or remove this confusion.

The record presents a clear case for the application of the familiar Federal rule that a substantial invasion of the constitutional right of the accused in criminal cases to a jury verdict upon competent evidence and the law as expounded in a proper charge, uninfluenced by external considerations, calls for a reversal, regardless of objection, exceptions, motion or assignment of error.

Brashfield v. U. S., 272 U. S. 448;
Weems v. U. S., 217 U. S. 349;
Crawford v. U. S., 212 U. S. 183;
Berger v. U. S., 295 U. S. 78;
New York Central R. R. Co. v. Johnson, 279 U. S. 310;
Read v. U. S., 42 F. 2d 636 (C. C. A. 8);
Beck v. U. S., 33 F. 2d 107 (C. C. A. 8);
Skuy v. U. S. (8 C. C. A.), 261 F. 316;
Pierce v. U. S., 86 F. 2d 949 (C. C. A. 6);
Volkmer v. U. S., 13 F. 2d 593 (C. C. A. 6);
U. S. v. Latham, 226 F. 420 (C. C. A. 5);
Pharr v. U. S., 48 F. 2d 767 (C. C. A. 6).

"Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the

public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the government itself be there a litigant. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' Berger v. United States, supra. 'Public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.' N. Y. Central R. Co. v. Johnson, supra, 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706. Where such paramount considerations are involved, procedural niceties will not preclude a court from correcting error."

(**Pierce v. U. S.**, Supra.)

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this court for its review and determination on the day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled on its docket, "J. Stacey Henderson, Appellant, v. United States of America, Appellee, No. 12,113," to the end that said case may be reviewed and determined by this court as provided by 2 U. S. C., Sec. 1254, and the applicable

rules promulgated by this court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this honorable court, and that petitioner may have such other and further relief in the premises, as to this honorable court may seem right and proper.

L. E. GWINN,
C. P. J. MOONEY,
Memphis, Tennessee,
Counsel for Petitioner.

EUGENE P. BOYD,
Memphis, Tennessee,
Of Counsel.

APPENDIX.

Proceedings in the
UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Cause Argued and Submitted.

October 22, 1954—Before: Simons, Chief Judge, McAllister and Miller, Circuit Judges.

This cause is argued by C. P. J. Mooney for appellant and by Robert E. Joyner for appellee and is submitted to the court.

Judgment.

(Filed: January 11, 1955.)

Appeal from the District Court of the United States for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Opinion.

(Filed: January 11, 1955.)

No. 12113.

UNITED STATES COURT OF APPEALS.
For the Sixth Circuit.

J. STACEY HENDERSON, Appellant, v. UNITED STATES OF AMERICA, Appellee.	Appeal from the District Court of the United States for the Western District of Tennessee, Western Division.

Decided January 11, 1955.

Before Simons, Chief Judge; McAllister and Miller, Circuit Judges.

Miller, Circuit Judge. In a previous trial, appellant was found guilty by a jury under an indictment charging violation of the Mail Fraud Statute, § 1341, Title 18, U. S. Code. On appeal the judgment was reversed because of the admission of evidence which the Court considered incompetent and prejudicial. **Henderson v. United States,** 202 Fed. (2d) 400, rehearing denied 204 Fed. (2d) 126. On the retrial, in which the evidence held incompetent was not offered, appellant was again found guilty by a jury and received a sentence of five years imprisonment and a $1,000 fine, from which judgment this appeal was taken.

The facts are fully stated in the opinion on the first appeal. In brief, the Government charged appellant with

a scheme to defraud of the following nature: Between June 9, 1948 and September 6, 1950, appellant, with some unfavorable experience in the business and without funds, came to Memphis, Tennessee, for the purpose of promoting the drilling of exploratory wells for oil and gas on two adjoining oil and gas leases in Caddo Parish, Louisiana, comprising 33.45 acres and 5.13 acres respectively. These tracts were part of a larger tract of 245 acres, upon which the Gulf Refining Company had drilled numerous wells beginning about 1908. These wells were pumped out and thereafter abandoned by 1914. The larger tract, for which appellant paid approximately $500.00, was divided into fractional undivided interests of 1/32nd each, which were sold to the public in the Memphis, Tennessee area at a $1,000 per unit. Two wells were drilled on this tract. Oil was struck in the second drilling but quickly decreased in volume, yielding approximately 100 barrels of commercial oil, following which operations on the tract were abandoned. The smaller tract, for which no consideration was paid by appellant, was divided into fractional undivided interests of 1/64th each, which were sold to the public in the Memphis, Tennessee area at a $1,000 per unit. The drilling on the second tract produced a dry hole, following which Henderson left Memphis. The indictment charged false representations by appellant in making the sales, and specifically alleged the mailing of a $500 check to appellant by Keller, a purchaser of a fractional interest in the second tract.

Appellant contends on this appeal, as he did on the first appeal, that the evidence was insufficient to take the case to the jury and that the trial judge erred in overruling his motions for a judgment of acquittal. On the former appeal, we were of the opinion that the evidence therein reviewed sustained the action of the trial judge and supported the verdict. That ruling constitutes the law of the case. Although an Appellate Court, upon a

second review, has the abstract power to reach a result inconsistent with its decision upon the first review of the same case, it is a power to be exercised very sparingly, and only under extraordinary conditions. **General American Life Ins. Co. v. Anderson,** 156 Fed. (2d) 615, 618-619, C. A. 6th. On a question such as is involved in this phase of the case, we adhere to our previous ruling unless there is a material difference in the evidence offered by the Government in the two trials.

All of the witnesses who testified for the Government in the first trial testified again in the second trial, with the exception of two. One of those who did not testify on the second trial was a co-defendant, Rout, who testified in the first trial about certain statements, which appellant made to him which bore on the issue of fraudulent intent. Our previous opinion referred to that testimony as part of the evidence justifying the submission of the case to the jury. Appellant claims its absence in the second trial is sufficient to change the ruling. **Page v. Arkansas Natural Gas Corporation,** 53 Fed. (2d) 27, 31, C. A. 8th, affirmed 286 U. S. 289. We do not agree. The present record again includes evidence of not only misrepresentations of material facts, referred to in the first opinion, but also representations as to value and soundness of the leases being explored that "go so far beyond the proper limits of the enthusiasm of the normal salesman, or the mistaken judgment of the honest man, as to impress them with the badge or mark of fraud." **Henderson v. United States,** supra, 202 Fed. (2d) at p. 404. Also to be noted, not previously referred to, is the testimony of Tell T. White, expert witness for the Government, to the effect that the history of the prior drillings and the abandonment of the leases, furnished no basis for any reasonable expectation on the part of appellant of bringing oil in on the leases in commercial quantities.

Appellant complains of the change in testimony on the part of some of the Government witnesses since the first trial. In the main, the changes made a stronger case against the appellant. The inconsistencies, if such they were, were fully developed by appellant on cross-examination, and presented a question of credibility for the jury. **Butzman v. United States**, 205 Fed. (2d) 343, 349, C. A. 6th, cert. denied 346 U. S. 828.

Appellant complains of the change in testimony on the permitting Mrs. Everlina B. Davis, one of the purchasers, to testify without personally determining her mental competency. Counsel stated to the Court that he had been advised that she had been taking shock treatments at a sanitarium for a mental disorder. Following some discussion of the matter between the Court and counsel, which disclosed that counsel had no personal knowledge in the matter, the Court requested the Assistant District Attorney to talk to her outside of the court room. He did so and reported that about a year or so before, she was involved in a bad automobile accident and they had given her shock treatments because of her worry about her son, who received a bad head injury in the accident, but that she was in full possession of her faculties. Although appellant's counsel requested the Court to make a personal examination of Mrs. Davis's mental competency, which was not done, and to which action he excepted, he offered no evidence or indicated he had any to offer, that would tend to discredit this report to the Court. He was offered the opportunity of talking to the witness himself, but did not do so. Upon becoming a witness, Mrs. Davis testified that she was a graduate of the University of Tennessee, was employed by the Mid-South Plumbing and Heating Company in Memphis in doing estimating work, for which firm she had worked for more than nine years, and that she had returned to work immediately after the accident in order to keep busy. Her testimony, both on

direct and cross-examination, was responsive and clear, and on this review gives no indication of mental incompetency.

The question of the competency of a witness is for the Court, not the jury. If the competency of a witness is challenged before testifying, it is the duty of the Court to make such examination as will satisfy it of the competency or incompetency of the witness. The form of the examination rests in the discretion of the Court. It is the better practice for the trial judge to either question the witness himself or to be present when the examination is conducted by counsel, and to rule on the basis of the evidence so heard. However, when a mature person of normal appearance and demeanor is offered as a witness, he is presumed to be a competent witness and incompetency must be shown by the party objecting to him. **Stephan v. United States**, 133 Fed. (2d) 87, 95, cert. denied 318 U. S. 781, rehearing denied 319 U. S. 783. Whether, on the facts developed, the witness is found by the Court competent or incompetent to testify, is the exercise of sound judicial discretion, which finding will be accepted on review in the absence of its abuse. **Stephan v. United States**, supra; **United States v. Tannuzzo**, 174 Fed. (2d) 177, 181, C. A. 2nd. Under the circumstances in this case, we find no prejudicial error in receiving the testimony of Mrs. Davis.

Appellant complains of the refusal of the District Judge to give numerous requested instructions to the jury. It is unnecessary to set them out in detail here. In general they dealt with the necessity of the Government proving that the appellant made the **particular** representations and promises described in the indictment, with knowledge of their falsity and with the intent to deceive regardless of other facts proven in the case; that unless these particular facts were proven beyond a reasonable doubt, the appellant should be acquitted, even though the Government

proved that more than the stated number of units were sold in the first tract, and even though the jury did not approve of the character of the contract between the appellant and the purchaser; that the jury could disregard the testimony of biased witnesses, of witnesses who wilfully gave testimony materially different from that given on the former trial, of witnesses who wilfully testified falsely in a material matter, or of witnesses whom they found to be impeached; that proof of contradictory statements by a witness on a material point may be sufficient to raise a reasonable doubt; and that the appellant was guilty of no fraud in retaining any surplus proceeds for his own use after performing what his contract obligated him to do.

The trial judge is not required to instruct the jury in the exact language requested by one of the parties. It is part of the judicial office to decide upon the style and form in which to explain the applicable law to the jury. If the substance of the requested instruction is involved in the case and is correctly explained to the jury, it is not necessary to express it in the categorial form which counsel has selected. **Southern Pacific Co. v. Guthrie,** 180 Fed. (2d) 295, 301, C. A. 9th; **Runde v. Manufacturers Casualty Ins. Co.,** 178 Fed. (2d) 130, 133, C. A. 2nd; **S. S. Kresge Co. v. Holland,** 158 Fed. (2d) 495, 499, C. A. 6th. The District Judge explained to the jury in detail "the scheme to defraud relied upon by the Government." In other places in the charge he referred to the fact that the appellant was on trial "for the one offense only as charged in the first count of the indictment," that it was necessary for the Government to prove beyond a reasonable doubt "that he knowingly made the false statements, representations and promises charged in the indictment," and that it was for the jury to determine whether the Government had met the burden of proving "the guilt of the defendant Henderson beyond a reasonable doubt of the offense

for which he is on trial." He explained at some length the problem presented when there were conflicts in the statements of witnesses, the tests to be used in adjudging the credibility of a witness, the methods of impeaching or discrediting a witness, and instructed the jury specifically that it was a question of fact for the jury to determine how far the testimony of any witness had been impaired by the invalidating processes previously described. He specifically told the jury "the issues of fraud in this case are not to be determined by the fact that the defendant may or may not have made a profit in these transactions, or that those buying units lost their money." In this trial, as in the first trial, appellant's theory of the transactions and his defense to the indictment were fully presented to the jury by the charge of the District Court. We briefly discussed and approved in our former opinion the completeness and fairness of those instructions. **Henderson v. United States**, supra, 202 Fed. (2d) 400, 404. There was no material difference in the instructions given in the second trial. We are of the opinion that the instructions given adequately covered the points raised by the numerous special requests made by the appellant, and fairly presented the case to the jury. **Louisville & Nashville R. Co. v. Tucker**, 211 Fed. (2d) 325, 334, C. A. 6th.

Appellant also complains of misconduct of the Government attorneys in their closing arguments to the jury, the more important instances being an appeal to the patriotism of the jury to protect the public, references to the purchasers as poor people and "suckers," statements of personal belief in the appellant's guilt, and incorrect statements of facts not justified by the evidence.

Unless calculated to inflame the minds of the jurors, an appeal to the civic responsibilities of jurors as law-abiding citizens is not misconduct. **Remus v. United States**, 291 Fed. 501, 511-512, C. A. 6th; **Tuckerman v. United States**, 291 Fed. 958, 969, C. A. 6th; **Stassi v.**

United States, 50 Fed. (2d) 526, 532, C. A. 8th; **People v. Mizzano,** 360 Ill. 446, 196 N. E. 439.

It is of course permissible for the district attorney to ask the jury for a conviction. **Nichamin v. United States,** 263 F. 880, 882, C. A. 6th. In doing so the district attorney has the right to summarize the evidence and urge upon the jury all reasonable inferences and deductions from the evidence. It is not misconduct on his part to **express** his individual belief in the guilt of the accused if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief. **United States v. Battiato,** 204 Fed. (2d) 717, 719, C. A. 7th; **Gridley v. United States,** 44 Fed. (2d) 716, 739, C. A. 6th, cert. denied 283 U. S. 827; **United States v. Klein,** 187 Fed. (2d) 873, 876-877, C. A. 7th; **United States v. Holt,** 108 F. (2d) 365, C. A. 7th, cert. denied 309 U. S. 672, rehearing denied 309 U. S. 698. Examples of the application of the rule can be found in the following cases: **People v. Caylor,** 386 Ill. 501, 54 N. E. (2d) 514; **People v. Mizzano,** supra, 360 Ill. 446, 196 N. E. 439; **West v. State,** 116 S. W. (2d) 726, Tex. Cr. App.; **Tomlinson v. State,** 132 S. W. (2d) 413, Tex. Cr. App.; **Shank v. State,** 189 Ark. 243, 72 S. W. (2d) 519; **Commonwealth v. Meyers,** 290 Pa. 573, 139 A 374; **People v. Pratchner,** 9 Cal. App. (2d) 451, 50 P. (2d) 75; **People v. McElheny,** 221 Mich. 50, 56. In our opinion the present case falls within the scope of the rule.

Where the nature of the offense charged reasonably includes a consideration of the economic status of the injured persons, as in a scheme to defraud, a defendant has no just cause to complain if their status is disclosed and commented upon in presenting the case to the jury. **Norman v. United States,** 100 F. (2d) 905, 907, C. A. 6th. In any event, the District Judge instructed the jury to disregard

any references to the economic status of the purchasers, as it was not a question to be considered in the case.

This case, both in the first trial and in the second one, was a hotly contested one. The present trial took approximately eight days' time. Counsel for the respective parties engaged in lengthy and vigorous argument to the jury. Differences of opinion and clashes between opposing attorneys were inevitable. A vigorous prosecutor in the heat of argument may at times use intemperate language, sometimes provoked by tactics or argument of opposing counsel. It is, of course, subject to control by the trial judge, with or without objection being made by the complaining party. **United States v. Goodman**, 110 F. (2d) 390, 395, C. A. 7th. But it must be remembered that in the closing argument to a jury the government attorney is an advocate, as is counsel for defense, and proper oratorical emphasis is denied to neither. **DiCarlo v. United States**, 6 F. (2d) 364, 368, C. A. 2nd; **Remus v. United States**, supra, 291 F., at page 511. We do not consider the remarks complained of in the present case as depriving the appellant of the fair trial to which he was entitled. **Kowalchuk v. United States**, 176 F. (2d) 873, 877, C. A. 6th; **Sharp v. United States**, 195 F. (2d) 997, 999, C. A. 6th; **United States v. Goodman**, supra.

The judgment is affirmed.

McAllister, Circuit Judge, dissenting. In the able and comprehensive opinion of Judge Miller, I concur in all that is said with respect to the admission of evidence, its sufficiency to sustain the verdict, the correctness of the district court's instructions to the jury, the law of the case, and the conduct of the trial court and of the district attorney—with one exception. I am of the view that the argument of the district attorney, and the manner in which it was presented, wherein he expressed his individual belief in the guilt of the accused, and the intimation that the jury

was under its oath and duty to convict the appellant, constituted reversible error. It is with reluctance that I come to this view, inasmuch as the case has already been tried on two different occasions, each time for several days before a jury, and it is here before us at the present time on a second appeal. However, the protection of the just rights of persons accused of crime by the government, which in this case I consider to have been clearly violated, brings me to this position.

In the long history of our law, we have continued to add to the protection of persons accused of crime, with firm ramparts of constitutional safeguards, and procedures to insure a fair trial. Although armed with the presumption of innocence, even an innocent person bears a heavy burden when charged with crime by the indictment of a grand jury, notwithstanding the fact that such an indictment is no more than an accusation based on hearing one side of the case; and to be tried by the government on a criminal charge subjects even an innocent person to great emotional strain and anxiety and physical stress. For, while the government, in proceedings against an individual in a court of justice, is only another party, nevertheless, the respect which the people have for the government in its capacity as the representative of their liberties gives it a prestige that is bound to carry over into the court room itself. Because of these considerations, courts are particular and zealous to insist upon a strict observance of the rights of the accused to a fair trial.

With regard to this case, it is to be said that the respect of the people for our Constitution and law extends, especially in the federal courts, to respect for the judge and for the district attorney. The district attorney, in the minds of the members of a jury in a federal court, stands as an officer who is engaged in the performance of the highest duties in the administration of justice; and men

bers of juries regard him as—in fact he is—one of the most important and respected officials of law and government. For this reason the expression of his personal opinion, in an argument before a jury, carries a weight far beyond such an expression by one who does not hold his high office; and it is not difficult to conclude that, during a forceful argument in a criminal case, the expression of his personal opinion that an accused person is guilty may well tip the scales in cases where, otherwise, the jury might conclude there was a reasonable doubt of guilt.

A district attorney, in his argument to the jury, has the right to draw all legitimate inferences from the evidence and to assert a belief, based on the evidence, that the accused is guilty. Nevertheless, it is error for him to indulge in remarks indicating his personal opinion that the accused is guilty; and such remarks in most cases are considered so flagrant as to require a reversal of the conviction.

In the case before us, the district attorney, in his closing argument, after referring to the evidence of the frauds claimed to have been perpetrated by appellant, went on to declare:

> "These things happen all the time. You read about it, and you like to stand around corners and say, 'Why doesn't the Government do something about all this stuff?' I have heard you. 'They ought to do something about it. They ought to get these people doing this stuff.' I have heard you. 'They'—you are 'they'——
>
> Mr. Mooney (counsel for defendant): If the Court please, I object to that, it is arguing inflammatory——
>
> Mr. Vaden: Excuse me.
>
> Mr. Mooney: It is, as I said a moment ago, an appeal to prejudice, and nothing else.
>
> The Court: What was?

Mr. Mooney: It is just an inflammatory appeal to prejudice, and nothing else—about what people say on corners—nothing else. . . .

The Court: Well, leave that out, Mr. Vaden. . . .

Mr. Vaden: I will take that back, the word 'they.' I will take that back, Your Honor. But this is the Government. This is the Government. You are the Government. You are the people that have got to decide this thing. There are just twelve people. They are you. His Honor can't decide it. I can't decide it. . . . This Grand Jury indicted this man, and when they indict him we are going to prosecute him. And that is what I am paid for, what I am going to do. I took an oath. You took an oath. I am doing my duty. I am doing it. I am going to do it. It may not be big—but I am going to do it—hot or cold—if I believe a man guilty. And if I don't believe he is guilty no one is going to make me stand here and prosecute him—not going to do it. But if I believe he is, I am going to put witnesses on here. . . ."

A little later the associate of the district attorney, in his argument, declared:

"And now it is dumped in your laps—see. We have about finished. Your own conscience—your own conscience. If your mind cannot rest easily on a verdict—if there is a reasonable doubt—answer me this—can your mind rest easily on a not guilty verdict?

Mr. Mooney: If the Court please, I think he ought to stop right there. I object to that. . . . He asked the alternate question, in substance—'Can your mind rest easily on a not guilty verdict—they should not be allowed to bring the Court a not guilty verdict.'

The Court: Are you objecting?

Mr. Mooney: I certainly am, sir.

The Court: Objection overruled."

In **State v. Thayer**, 124 Ohio St. 1, a special prosecutor stated to the jury that he would not be in the case unless he was convinced of the guilt of the accused. Upon objection by counsel for the accused and request for a mistrial, the prosecutor said, in the presence of the jury: "We feel that it is entirely just in the light of the evidence." The Supreme Court of Ohio held that, even though the record disclosed no other error, the overruling of the objection and motion by the trial court constituted prejudicial reversible error.

In **State v. Gunderson**, 26 N. D. 294, 144 N. W. 659, in a criminal case, counsel for the state, in his closing argument, said: "I do not come here to try a case unless the defendant is guilty." The court immediately intervened and told the jury: "The court now admonishes the state's attorney that the remark is improper, and suggests that he in no manner refers to his opinions in his further address to the jury." In reversing the conviction the Supreme Court said: "No one who is at all conversant with jury trials can fail to see the possible prejudice of this remark. The scales were hanging in the balance. . . . In such a juncture the state's attorney himself testifies, and seeks to force into the issue his own personality and his own standing and influence. He practically tells the jury that the defendant is guilty, when he knows that he cannot be cross-examined as to his statement. It is universally held that such remarks are not merely a breach of professional propriety and professional ethics, but constitute legal error."

In the instant case the district attorney admonished the jury that both he and the jury had taken an oath to do their duty; that he was doing his duty and was prosecuting the accused because he believed him guilty, although no one could make him undertake the prosecution unless he did believe him guilty. The foregoing should be considered together with the statement to the jury—almost an accusa-

tion—that the district attorney had heard members of the jury standing around corners asking why the government did not do something about these things, and also saying that the government ought to get the people who did such things; that neither he, as district attorney, nor the district judge could do anything about it; that the jury had taken an oath to do its duty; and then the question was asked of the members of the jury whether their minds could rest easily on a not guilty verdict. The impression which these statements and arguments made on the jury seems self-evident—that the jury, as citizens, had been complaining why the government did not get malefactors such as appellant; that the district attorney now had appellant before them in court and believed him guilty inasmuch as no one could make him prosecute unless he believed the man guilty; that the jury itself was the government over whose remissness, in the past, they had complained; that while the district attorney could not do anything about the decision, he had taken an oath to do his duty and was doing his duty because of his belief of the guilt of appellant, and he strongly intimated that since the jury had taken an oath also to do its duty, their minds could not rest easily on a non-guilty verdict. To bring in a verdict of guilty on the ground that the minds of the members of the jury could not rest easily on a not guilty verdict would be a failure on the part of a jury to perform its duty. The criterion is not whether the minds of the members of the jury could rest easily on a verdict of not guilty. In fact, in a criminal case, the members of the jury could well perform their duty in returning a verdict of not guilty and their minds might still be very uneasy in cases where they had the strongest suspicion of the guilt of defendant, and yet could not say that he was guilty beyond a reasonable doubt. Under these circumstances, the district attorney's personal belief, as expressed to the jury, that appellant was guilty constituted prejudicial error.

A prosecuting attorney in a criminal case is not bound to make his argument to the jury colorless or argue both sides of the case, if defendant is represented by counsel; and he may present forceably the government's side of the case. He is not, however, justified in thrusting his personality into the case and expressing his opinion that the defendant is guilty, or stating as a fact anything except what the evidence tends to prove or which he expects in good faith to prove. If he violates this rule he is guilty of misconduct; and, in the instant case, we are of the opinion that the conduct of the district attorney was prejudicial to the substantial rights of the accused. See **State v. Clark**, 114 Minn. 342, 131 N. W. 369.

The government cites several cases in support of the contention that it is not necessarily misconduct for the district attorney to express his individual belief in the guilt of the accused, if such belief is based solely on the evidence introduced, and the jury is not led to believe that there is other evidence known to the prosecutor but not introduced, justifying that belief. We shall briefly discuss the pertinent cases relied upon by the government.

In **Gridley v. United States**, 44 F. (2d) 716 (C. C. A. 6), defendant's attorney, in his argument to the jury, had stated that the district attorney was seeking an unjust conviction, merely because of his ambition to win the case. The district attorney, in response, declared to the jury that he believed the accused was guilty. To this statement counsel for defendant objected, and was overruled. The trial court, however, in its instructions to the jury, stated that it was to pay no attention to this statement, but that since defense counsel had charged the district attorney with an improper motive, he was fully justified in defending himself against "those very unjust, improper charges . . . and was abundantly justified in denying the unjust accusations made against him . . ., but I do say to the

jury that they are not concerned with the opinion of counsel as to what he thinks about the guilt or innocence, and they will ignore that and pay no attention whatever to it, and he was driven into that statement by the unfair accusations made against him." The foregoing case is obviously distinguishable from the case at bar.

In **United States v. Klein**, 187 F. (2d) 873 (C. A. 7), complaint was made by the accused of statements of the district attorney during argument in which, in discussing the evidence, he said "I know——" with respect to certain evidence thereafter set forth. In these instances, when the expression, "I know," was used, it was followed by the outline of the evidence on which this statement was based. As the court stated: "For example, when it was said: 'I know you can drive from Chicago from 12 o'clock noon to four o'clock in the afternoon,' it was added immediately 'because we had a man on the stand who did it.' And, again, when he said: 'I know Estelle Klein is a liar,' he added, 'because other people whose veracity can't be doubted have told us from the witness stand that Eddie Klein wasn't in Chicago watching a television set that night, but was down here with a gun in his hand, etc.'" This is plainly distinguishable from the instant case.

United States v. Battiato, 204 F. (2d) 717 (C. A. 7), is a case nearest to supporting the government's position in this regard, but that case, too, is distinguishable from the instant case. There, counsel for the accused, in his argument to the jury, had referred to the building which houses the Department of Justice in Washington, and stressed the motto inscribed on that building: "The Government wins when justice is done." Immediately after this statement by appellant's counsel the district attorney began his argument and said: "I for one subscribe to the motto that the Government wins when justice is done. If I, in my own mind, thought for one minute that these defendants were

not parties to this case, I certainly would not have the courage to stand up here and argue before you that they were guilty. It is never our intention to prosecute and try innocent men." In so saying, it seems to me, that the district attorney was replying to the defense argument and telling the jury that in his opinion the government would not win if it received a verdict that was unjust to the accused, but that in his opinion because the accused was guilty, such a verdict would not be unjust. Unless the statement was palliated by the context—which I am not sure it was—I would consider it to be prejudicial.

The court of appeals, in the foregoing case, held that when the context from which the statement of the district attorney was taken, was taken into consideration, it became clear that no improper argument was presented. There is no context in the instant case that, in like manner, could be said to justify the statements of belief in appellant's guilt by counsel for the government.

In view of the foregoing, I am of the opinion that the judgment of conviction should be reversed.

Petition for Rehearing.

(Filed: January 25, 1955.)

Copy furnished with original transcript.

Order Denying Petition for Rehearing.

(Filed: February 18, 1955.)

Appellant's petition for rehearing having been considered by the Court,

It Is Ordered that said petition be denied.